

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALFREDO RODRIGUEZ)	
Claimant)	
VS.)	
)	Docket Nos. 201,640 & 202,963
IBP, INC.)	
Respondent,)	
Self-Insured)	

ORDER

Claimant appealed the January 27, 2000 Award entered by Administrative Law Judge Brad E. Avery. The Appeals Board heard oral argument on May 17, 2000. The Director appointed Jeff K. Cooper of Topeka, Kansas, to serve as Appeals Board Member Pro Tem in place of Gary M. Korte, who recused himself from this proceeding.

APPEARANCES

Keith L. Mark of Mission, Kansas, appeared for claimant. Gregory D. Worth of Lenexa, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. Additionally, the parties stipulated that Dr. John Moore's 14 percent whole body functional impairment rating for claimant's bilateral carpal tunnel syndrome should be considered as part of the evidentiary record.

ISSUES

Docket #201,640 is a claim for cumulative trauma that occurred through March 11, 1998, that allegedly injured both upper extremities, the upper back, and neck. Docket #202,963 is a claim for a March 8, 1995 back injury.

In Docket #201,640, the Judge adopted the medical opinion of Dr. Philip R. Mills and found that claimant had a 12 percent whole body functional impairment for injuries to his upper extremities. Additionally, the Judge found claimant's average weekly wage was \$381.31.

In Docket #202,963, Judge Avery found that claimant had failed to prove that he sustained personal injury by accident arising out of and in the course of employment with respondent and, therefore, denied claimant's request for benefits.

Claimant contends the Judge erred in Docket #201,640, the repetitive traumas claim, by (1) awarding claimant benefits for only a 12 percent whole body functional impairment instead of the 27 percent rating that Dr. P. Brent Koprivica provided and (2) failing to find that claimant's average weekly wage should be based upon a six-day workweek and, thus, equaled \$455.79.

Claimant contends Judge Avery erred in Docket #202,963, the March 1995 back injury claim, by (1) failing to find that claimant was entitled to an award of permanent partial disability benefits in the range of seven to 11 percent and (2) failing to find that claimant's average weekly wage should be based on a six-day workweek and, thus, equaled \$429.08.

Conversely, respondent contends the Judge's findings and conclusions are supported by the greater weight of the evidence and should be affirmed.

The issues before the Appeals Board on this review are:

1. Did claimant injure his back while working for respondent on March 8, 1995?
2. If so, what is the nature and extent of the injury and disability?
3. What is the nature and extent of the injury and disability, if any, from the repetitive traumas that claimant sustained through March 11, 1998?
4. What is the average weekly wage for each alleged accident?

Docket #201,640

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Claimant began working for respondent, a packing house, in May 1994. In approximately October or November 1994, claimant began having symptoms in both of his hands and arms, which he attributed to the hook and knife work required in his job. As claimant continued to work for respondent, his symptoms increased. Claimant saw a number of doctors and in March 1998 underwent bilateral carpal tunnel releases. Respondent has stipulated that claimant's upper extremity injuries arose out of and in the course of employment.

2. After recuperating from his carpal tunnel release surgeries, claimant returned to work for respondent and, therefore, his claim for permanent partial disability benefits is limited to the functional impairment rating.

3. As indicated above, the parties have stipulated that the record should contain Dr. John Moore's functional impairment rating. Dr. Moore, the surgeon who performed both carpal tunnel releases, rated claimant as having a 15 percent functional impairment to the right upper extremity at the wrist level and a 10 percent functional impairment to the left upper extremity, which combine for a 14 percent functional impairment to the whole person.

4. Dr. Philip R. Mills, whom the Judge appointed to perform an independent medical evaluation, examined claimant in April 1999 and found a 10 percent functional impairment in each upper extremity for the carpal tunnel syndrome, which converts to a 12 percent functional impairment to the whole person. Dr. Mills also diagnosed myofascial pain syndrome with symptom magnification, but did not believe that condition created a permanent impairment. Likewise, the doctor did not rate claimant's left shoulder impingement because of inconsistent findings. The doctor utilized the fourth edition of the *AMA Guides to the Evaluation of Permanent Impairment* to rate claimant.

5. Claimant's attorney hired Dr. P. Brent Koprivica to evaluate and rate claimant. Dr. Koprivica saw claimant four times from May 1996 through February 1999. Dr. Koprivica diagnosed previously operated bilateral carpal tunnel syndrome and chronic regional myofascial pain syndrome in the cervicothoracic region. Utilizing the fourth edition of the *AMA Guides*, the doctor rated claimant as having a 20 percent functional impairment in each upper extremity for the carpal tunnel syndrome and an additional five percent functional impairment to the whole person for the myofascial pain syndrome, which convert to a 27 percent whole body functional impairment. Excluding the five percent for the myofascial pain syndrome and using the *AMA Guides'* conversion chart, claimant has a 23 percent whole body functional impairment due to the bilateral carpal tunnel syndrome alone.

6. Dr. Vito J. Carabetta, the physical medicine and rehabilitation specialist who treated claimant for back problems in late 1995 and early 1996, testified that Dr. Koprivica's five percent rating for myofascial pain syndrome was reasonable if that condition was restricted to the neck and upper back. But Dr. Carabetta believed that the fibromyalgia was more generalized and, therefore, not related to claimant's work. The doctor also found claimant magnified his symptoms.

7. The Appeals Board finds that claimant permanently injured both upper extremities and developed bilateral carpal tunnel syndrome as a result of the repetitive traumas he sustained at work through March 11, 1998. But the Appeals Board is not persuaded that claimant's myofascial pain syndrome or fibromyalgia is related to his work as it appears to be more generalized throughout claimant's body. The functional impairment ratings provided by Dr. Moore, Dr. Mills, and Dr. Koprivica for the bilateral carpal tunnel condition are credible and should be given equal weight. Therefore, the Appeals Board averages those three ratings (14 percent, 12 percent, and

23 percent) and finds that claimant has sustained a 16 percent whole body functional impairment as a result of the repetitive traumas he sustained through March 11, 1998.

8. Rodger Brownrigg, who is respondent's complex personnel manager, testified regarding claimant's work schedule. The records introduced at Mr. Brownrigg's deposition indicate that claimant worked only three six-day weeks in the 26-week period before March 11, 1998. Mr. Brownrigg's testimony and records indicate that respondent would give claimant other days off during the week when it appeared that claimant would be required to work on that Saturday. The Appeals Board finds that as of March 1998 claimant usually and regularly worked, and would reasonably expect to work, five days per week.

CONCLUSIONS OF LAW

1. Claimant continues to work for respondent and, therefore, his claim for permanent partial disability benefits is limited to the functional impairment rating.¹ Therefore, claimant is entitled to an award for a 16 percent permanent partial general disability for the bilateral carpal tunnel injuries.

2. The Appeals Board concludes that claimant's wage should be based upon a five-day workweek rather than a six-day week. The Appeals Board is aware that in *Tovar*² the Court of Appeals stated that employees being told that they are to keep Saturdays open and available for work is tantamount to a directive that they are expected to work each Saturday. But the present fact situation is distinguishable from *Tovar* as respondent attempted to give claimant another day off during those weeks in which he was expected to work Saturday. Unlike *Tovar*, as of March 11, 1998, claimant reasonably expected to work only five days per week even when he expected to work Saturdays.

3. The Workers Compensation Act provides that a full-time worker's average weekly wage is determined by adding the worker's straight-time weekly rate to the average weekly overtime earnings the worker earned in the 26-week period before the accident. The Act reads, in part:

If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: . . . (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the

¹ See K.S.A. 1997 Supp. 44-510e.

² *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991), *rev. denied* (1991).

employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.³

4. Using the above formula, claimant's average weekly wage for the March 11, 1998 accident is \$383.62. That wage is calculated by adding claimant's straight-time weekly rate of \$372⁴ to his average weekly overtime earnings of \$11.62.⁵ The evidence does not establish that those earnings designated as "other" on the earnings records represent additional compensation items that are includible in the wage computation. Therefore, those "other" earnings are not included in the wage computation.⁶

AWARD

WHEREFORE, the Appeals Board modifies the January 27, 2000 Award entered by Judge Avery and increases the average weekly wage from \$381.31 to \$383.62 and increases the permanent partial general disability from 12 percent to 16 percent.

Alfredo Rodriguez is granted compensation from IBP, Inc., for a March 11, 1998 accident and resulting disability. Based upon an average weekly wage of \$383.62, Mr. Rodriguez is entitled to receive 7 weeks of temporary total disability benefits at \$255.76 per week, or \$1,790.32, plus 66.4 weeks of permanent partial general disability benefits at \$255.76 per week, or \$16,982.46, for a 16 percent permanent partial general disability, making a total award of \$18,772.78, which is ordered paid in one lump sum less any amounts previously paid.

³ K.S.A. 44-511(b)(4).

⁴ The straight-time weekly rate is found by multiplying claimant's \$9.30 hourly rate by the eight hours per day that he regularly worked, and then by the five days per week that he expected to and regularly worked.

⁵ Claimant was paid \$278.97 in overtime in 24 of the 26 weeks before the March 11, 1998 accident for which there are earnings records. That averages \$11.62 per week. The overtime pay is found in the earnings records introduced at claimant's November 3, 1999 deposition.

⁶ See K.S.A. 44-511(a)(2).

The Appeals Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Docket #202,963

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Claimant also alleges that he injured his low back while working for respondent on approximately March 8, 1995. At that time, claimant was bending over and lifting a pan of either meat or cow skins and felt pain in his back. Claimant immediately reported the incident to his supervisor and to respondent's medical dispensary.
2. In December 1995, Dr. Carabetta began treating claimant's back. The doctor ordered an MRI, which indicated that claimant had mild bulging of the L4-5 disc and some arthritic changes at the same level. In February 1996, Dr. Carabetta performed electrodiagnostic studies, which indicated claimant had active radiculopathy that was acute in nature and separate from any earlier lumbar abnormalities. The doctor believed that claimant had sustained a seven percent whole body functional impairment as a result of the March 8, 1995 low back injury. Dr. Carabetta's seven percent rating is in addition to the impairment that claimant sustained as the result of a 1988 back injury and the resulting L4-5 lumbar laminotomy with nerve root decompression and partial facetectomies. The doctor used the revised third edition of the *AMA Guides* in rating claimant's back.
3. Dr. Koprivica, who also evaluated claimant for purposes of the repetitive traumas claim, diagnosed chronic lumbosacral strain and testified that claimant permanently injured his back in the March 1995 lifting incident. Using the revised third edition of the *AMA Guides*, Dr. Koprivica determined that claimant sustained an additional 11 percent functional impairment as a result of the March 1995 accident, which was over and above the estimated 10 percent functional impairment that claimant had as a result of the 1988 injury and resulting back surgery.
4. Dr. Sergio Delgado, the orthopedic surgeon that respondent hired to evaluate claimant's back, examined claimant in January 1998. According to Dr. Delgado, claimant is a symptom magnifier and claimant's present symptoms are from foraminal narrowing and facet degeneration in the area of the 1989 surgery. Without asking whether claimant's symptoms differed now from those following the 1989 surgery, Dr. Delgado determined that claimant does not have any additional impairment as a result of the alleged March 1995 incident.

5. Dr. Mills, who did not testify but whose April 1999 report is in evidence, did not rate claimant's back as he felt the back was a preexisting problem.

6. The Appeals Board finds that claimant made a good recovery following his 1989 back surgery and was able to return to strenuous physical labor. The Appeals Board also finds that it is more probably true than not that claimant permanently injured or aggravated his back while working for respondent in March 1995. Averaging the seven percent functional impairment rating provided by Dr. Carabetta with the 11 percent functional impairment rating provided by Dr. Koprivica, the Appeals Board finds that claimant has sustained a nine percent whole body functional impairment as a result of the low back injury that claimant sustained on or about March 8, 1995.

7. At the time of the March 1995 accident, claimant reasonably expected to work six days per week. That finding is based upon the records introduced at Mr. Brownrigg's deposition that indicate that claimant worked 14 six-day weeks in the 26-week period before March 8, 1995. Working six-day workweeks on that many occasions, coupled with a directive to keep all Saturdays available for work, created a reasonable expectation as of the accident date that claimant would usually and regularly work six days per week.

CONCLUSIONS OF LAW

1. Claimant's March 8, 1995 accident arose out of and in the course of employment with respondent. As of the date of the regular hearing, claimant continued to work for respondent. Therefore, claimant limits his claim for permanent partial general disability benefits to the functional impairment rating. The Appeals Board finds and concludes that claimant has a nine percent permanent partial general disability in this claim.

2. Claimant's average weekly wage for the March 8, 1995 accident is \$406.61, which is calculated by adding claimant's straight-time weekly rate⁷ to his average weekly overtime earnings.⁸

⁷ Claimant's straight-time weekly rate is determined by multiplying his \$8.11 hourly wage by the eight hours per day that he regularly worked. The daily rate of \$64.88 is then multiplied by the six days per week that claimant usually and regularly worked, which yields a straight-time weekly rate of \$389.28. See K.S.A. 44-511(b)(4)(B)(ii).

⁸ Because claimant's straight-time week is comprised of 48 hours, it includes the first eight hours of overtime. Therefore, in computing claimant's overtime earnings the first eight hours of overtime per week are calculated at one-half time and any remaining hours are calculated at time and one-half. In the 26-week period before the accident, claimant worked approximately 107 hours of overtime. But only two of those 107 hours occurred in weeks in which claimant worked more than 48 hours. Multiplying 105 hours by the half-time rate of \$4.06 (\$8.11 x .5) yields \$426.30. Multiplying two hours by the time and one-half rate of \$12.17 (\$8.11 x 1.5) yields \$24.34. Therefore, claimant's total overtime earnings equal \$450.64, which averages \$17.33 per week.

The Appeals Board notes that the earnings records show that claimant earned monies designated as "other." But the record fails to establish that the "other" amounts represent items properly included in the average weekly wage computation. Therefore, those earnings are not included in the computation.⁹

AWARD

WHEREFORE, the Appeals Board modifies the January 27, 2000 Award entered by Judge Avery and grants claimant an award for a nine percent permanent partial general disability based upon an average weekly wage of \$406.61.

Alfredo Rodriguez is granted compensation from IBP, Inc., for a March 8, 1995 accident and resulting disability. Based upon an average weekly wage of \$406.61, Mr. Rodriguez is entitled to receive 37.35 weeks of permanent partial general disability benefits at \$271.09 per week, or \$10,125.21, for a nine percent permanent partial general disability, making a total award of \$10,125.21, which is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of July 2000.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: Keith L. Mark, Mission, KS
Gregory D. Worth, Lenexa, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director

⁹ See K.S.A. 44-511(a)(2).